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No. 91-1449

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

HELEN PHILLIPS; CARSON K. WORKMAN; JOE AHLERS, a/k/a Uwe Ahlers, individually and on behalf of all others similarly situated,

Petitioner,

ALASKA HOTEL AND RESTAURANT EMPLOYEES PENSION FUND,

Respondent,

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.
STATEMENT OF THE CASE

Petitioners filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit dated March 5, 1992. Respondent filed its Respondent's Brief in Opposition dated April 8, 1992. Petitioners submit this Reply to Respondent's Brief in Opposition pursuant to Supreme Court Rule 15.6.

The statutory provision which confers jurisdiction on this Court to review the judgment in question is 28 U.S.C. § 1254(1).

II.
CONFLICT AMONG THE CIRCUITS HAS BEEN CREATED BY THE NINTH CIRCUIT'S REJECTION OF LONG ESTABLISHED STANDARDS FOR CORRECTION OF ARBITRARY AND CAPRICIOUS CONDUCT BY PENSION FUND TRUSTEES

The fund argues that the petition is flawed because its claim of arbitrary and capricious conduct by the Defendant Trustees presents only intracircuit questions, not a conflict between the circuits (Respondents' Brief in Opposition, pp. 13-

14). This is simply not the fact. Until this case, the prevailing rule both within the Ninth Circuit and in at least four other circuits has deemed disqualification from benefits arbitrary and capricious when caused by absence from covered employment for reasons beyond the control of the participant.

Whether characterized as a break in service, a lack of sufficient service, a requirement that the participant's last employer be a contributor to the fund, or any other label, the impact has always been the same: trustee action which denies benefits for reasons beyond the employee's control is arbitrary and capricious; if that action takes the form of a general plan rule or practice, it is a structural defect.

The Court of Appeals for the District of Columbia Circuit adopted this test more than 20 years ago. In *Lavella v. Boyle*, 444 F.2d 910 (D.C. Cir. 1971), a fund was prohibited from applying a disqualifying break-in-service rule to an employee who had "no choice" but to be out of covered employment due to a physical disability. This be-

came the basis for a subsequent ruling that an absence from covered employment could not be invoked to disqualify a participant under a "signatory last employer" rule (i.e., at time of retirement the participant must be working in covered employment for an employer signatory to a union contract regardless of what plan credits the participant had accrued earlier), *Teston v. Carey*, 464 F.2d 765 (D.C. Cir. 1972); cf. *DePaoli v. Boyle*, 447 F.2d 334 (D.C. Cir. 1971). These cases were then relied upon in *Norton v. I.A.M. Nat'l. Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977), for the proposition that a fund could not deny benefits to an employee who stayed at a job with the original employer (and thus was absent from further fund participation) after that employer's employees voted to withdraw from the union which sponsored the fund. In each case cited above, absence from covered employment in the fund was not allowed to deny benefits when that absence was beyond the employee's control. When, as in this case, the employee accepted non-union work because economic conditions in the

industry prevented any alternative, the trustee's action was arbitrary and capricious, the rule being enforced was a structural defect, and judicial intervention was warranted, *Treston v. Carey*, *supra*.

The Third Circuit has taken the same position. *Rosen v. Hotel & Restaurant Employee & Bartenders Union of Philadelphia*, 644 F.2d 592 (3d Cir. 1981) held that trustees were arbitrary and capricious because they invoked plan rules which did not allow employees to preserve covered employment by paying their own pension contributions when their employer was delinquent (in spite of a trustee-business agent informing the employees to the contrary), and deemed the absence of employer-paid contributions to create a break in service. Thus, the employer's delinquency and the consequent break in contribution flow was beyond the employee's control and the employee could not be disenfranchised by such circumstances.

In *Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978), the Third Circuit remanded a case to determine whether there was any evidence of actuarial

necessity to justify a rule imposing a break in service on a participant who left covered employment before reaching retirement age because his contributing employer went bankrupt and the participant could not find other work under a union contract.

> "... where a settled requirement capriciously excludes employees from benefits, it is not the prudence of the plan's administration which is at issue, but the fairness of its basic structure. Such an exclusion constitutes a failure to conform to the 'sole and exclusive benefit' requirement, and thus may be reviewed in the federal courts ...".

Id. at 86. This decision relied on *Norton v. I.A.M. Nat'l. Pension Fund, supra,* and similar cases for the proposition that judicial intervention is appropriate where rules deny benefits for employees who are unable to complete service requirements for reasons they cannot control. cf. *Seafarers Pension Fund v. Sturgis*, 630 F.2d 218 (4th Cir. 1980), which also held that a signatory last employer requirement was

arbitrary, capricious and a structural defect when it created a break in service based on the time the employee was unable to work in covered employment.

The Seventh Circuit has also followed this interpretation of *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972), *Norton, supra,* and *Knauss, supra*. In *Van Fossan v. Teamsters Local 710 Pension Fund*, 649 F.2d 1243 (7th Cir. 1981), that court stated:

> "We believe the distinction between voluntary and involuntary breaks-in-service is crucial to determining the arbitrariness of the operation of a given break-in-service rule."

Id. at 1248. Even when the absence from covered employment was due to a promotion out of the bargaining unit, which suggests the voluntary acceptance by the individual of such displacement, the Seventh Circuit treated such disqualification as arbitrary and capricious and subject to judicial correction, *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978).

Far from raising only an inconsistency within the Ninth Circuit decisions, this case presents a departure by that court from its own precedent **as well as a conflict with the decisions of at least four other circuits.**

> A prerequisite that divests the employee on whose account contributions were made because of an involuntary break in service, and that distributes those contributions to other employees, seems to be at odds with the Congressional intent in enacting the 'sole and exclusive benefit' requirement."

Knauss v. Gorman, supra at 89.

III. CONCLUSION

For more than two decades, the courts of appeals have utilized the involuntary absence argument to prohibit disqualification of participants simply because they were unable to complete normal service records due to lack of available jobs in covered employment. Therefore, not only is this a case of substantial importance because of the

abuse of thousands of workers, as discussed in the Petition, but it also presents a direct conflict among the circuits on both the structural defect and statute of limitations rulings.

RESPECTFULLY SUBMITTED this 15th day of April, 1992.

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